# United States Department of Labor
# Employees' Compensation Appeals Board

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| **A.S., Appellant** | ) | |
| **and** | ) | **Docket No. 08-2195** |
| | ) | **Issued: June 10, 2009** |
| **U.S. POSTAL SERVICE, POST OFFICE, Jackson, MS, Employer** | ) | |

*Appearances:*
*Appellant, pro se*
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On August 6, 2008 appellant filed a timely appeal from February 12 and July 23 2008 merit decisions of the Office of Workers' Compensation Programs, denying her emotional condition claim and an April 29, 2008 nonmerit decision, denying her request for an oral hearing. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

### ***ISSUES***

The issues are: (1) whether appellant sustained an emotional condition in the performance of duty; and (2) whether the Office properly denied appellant's request for an oral hearing.

### ***FACTUAL HISTORY***

On August 10, 2006 appellant, then a 46-year-old distribution clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained anxiety, stress and depression as a result of discrimination, harassment and disparaging treatment at the employing establishment. She

noted that she was under duress to sign another job offer and was told to leave work if she did not sign. Appellant stopped work July 26, 2006.[1]

By letter dated September 13, 2006, the Office requested that appellant provide additional information regarding her claim within 30 days. Appellant, however, did not submit any evidence. In a November 13, 2006 decision, the Office denied the claim, finding that appellant did not establish that the claimed incidents occurred as alleged.

On December 7, 2006 appellant requested reconsideration. In a November 25, 2006 letter and several undated statements, she alleged that management gave her multiple modified job offers and changed her off days without following the proper procedures. On April 19, 2006 appellant stated that her supervisor, Diamond Allen, gave her a modified job offer that was intentionally outside of her work restrictions. The offer was presented at 6:00 a.m. and appellant was told to sign and return it before leaving work, which was at 6:30 a.m. Ms. Allen told appellant to go home when appellant advised her that she was not signing the job offer. Appellant indicated that Ms. Allen often told employees who disagreed with her to go home. She stated that Mary Gordon, an acting manager, called her later that day to find out why she did not sign the April 19, 2006 job offer. When appellant pointed out that the job offer was at the main employing establishment, where she could not work, Ms. Gordon advised that she would change the location. She alleged that Ms. Gordon stated that she could have Sunday off. Appellant signed the job offer on April 24, 2006. She stated that Ms. Allen incorrectly prepared the job offer and Ms. Gordon corrected it. Appellant denied going behind Ms. Allen's back and did not appreciate being in the middle of Ms. Allen and Ms. Gordon trying to "out do or undo the other." Following this, she alleged that Ms. Allen told her that she was going to change her off days back and presented her with another job offer on May 6, 2006. Appellant alleged that incomplete job offers were mailed to her at home to harass her. She further alleged that Ms. Allen did not go through Ms. Gordon or Injury Compensation. Appellant received multiple job offers after she signed the April 24, 2006 offer, which was confirmed by a notification of personnel action indicating that she was placed in modified job offer effective April 29, 2006.

On May 19, 2006 appellant was provided with a new modified job offer, with corrected scheduled days off. On July 27, 2006 she was presented the May 19, 2006 job offer again. Appellant alleged that an acting supervisor was instructed by Ms. Allen that appellant should either sign the job offer or go home. She left work and did not return until October 2, 2006. Appellant indicated that leaving work caused her undue stress, anxiety and depression. She alleged that Ms. Allen was harassing her and had created a very hostile environment. On November 9, 2006 appellant was again presented with the May 19, 2006 job offer. She indicated that Tunya Hill, an acting manager, gave her a letter which advised that, as of November 18, 2006, appellant was to adhere to the May 19, 2006 modified job offer and her off days would be Saturday and Friday. Appellant contended that the May 19, 2006 modified job offer was illegal and her rights were violated. On November 13, 2006 she stated that she was informed by an acting supervisor that her off days were changed in the computer system, which was illegal. On

[1] The employing establishment removed appellant from employment on March 21, 2008 due to failure to be regular in attendance, failure to follow instructions, and failure to meet requirements of position.

November 1, 2006 appellant alleged that she performed the duties of three people and other employees were not required to perform extra work.

On November 23, 2006 appellant reported to work at 10:00 p.m. She stated that Ms. Hill asked why she was at work as her schedule was changed. Appellant was told to leave as she was being taken off the clock. She asked for a representative but was not provided one. Appellant noted that the police were called and she was escorted from the building by two police officers at Ms. Hill's request. Ms. Hill asked for appellant's badge and told her not to come back until called. Appellant alleged that this caused injury to her character as well as humiliation and embarrassment. She stated that Ms. Allen inappropriately touched employees, had inappropriate relationships with employees, used equipment to make copies of inappropriate material, brought inappropriate material to work and had biased relationships with employees.

In support of her claim, appellant submitted letters regarding the May 19, 2006 modified job offer as well as earlier modified job offers; an April 29, 2006 notification of personnel action; work schedules from April 29 to May 12, 2006; witness statements from coworkers Selena Johnson, Carolyn Adams, Kadrine Smith, Cocandra Thomas, James Schuller and Tasha Crowley; and material pertaining to grievances and Equal Employment Opportunity (EEO) claims.

Medical reports from Brentwood Behavorial Healthcare of MS were also received. In an August 25, 2006 report, Dr. Krishan K. Gupta, a psychiatrist, noted appellant's problems with work and diagnosed adjustment disorder with depressed mood.

In an undated statement, Ms. Allen denied appellant's allegations of creating a hostile or stressful working environment. She asserted that she treated all employees fairly and maintained that the job offers were based on the needs of the service and that appellant's preference for off days was determined on the seniority of limited-duty employees.

In a February 12, 2007 letter, Larry Sanders, a human resources manager, advised that appellant had been on limited duty since 1994 due to bilateral wrist tendinitis. Due to changing technology and workforce needs, limited-duty job offers were periodically updated to reflect such changes. Mr. Sanders advised that in 13 years there were about four occasions in which appellant's job offer was updated. He stated that she resisted new job offers and usually refused to sign them. Mr. Sanders noted that appellant had worked for several supervisors and each one encountered resistance from her. He advised that she refused to adhere to the schedule in her current job offer and disobeyed orders in reporting to work when she was not scheduled. Appellant was asked to leave on November 23, 2006 and, when she refused, authorities were summoned to escort her from the premises. Mr. Sanders denied that the employing establishment acted inappropriately. In a February 26, 2007 response, appellant asserted that she was caught in a "power struggle" between managers. She resubmitted copies of modified job offers and complaint letters; letters from her Senator; a May 18, 2006 memorandum pertaining to the modified job offer effective April 19, 2006, accepted on April 24, 2006, which was rescinded; and a copy of an excerpt from an unknown publication defining the terms "undue influence" and "duress."

By decision dated March 20, 2007, the Office denied appellant's claim finding that she had not established a compensable factor of employment.

On January 7, 2008 appellant requested reconsideration, contending that her bid job was "abolished" improperly. She alleged that the letter Ms. Hill gave her was not contractually sound. Appellant generally alleged that Ms. Hill violated her civil rights when she had two police officers escort her from the premises. She alleged that she was stripped of her off days, worked out-of-schedule and did not get paid. In a January 9, 2008 letter, appellant alleged that letters written by Theressa McQuarter, a manager, and Ms. Allen had used veiled threats against her. She submitted an undated statement regarding challenging discipline by Mark Cunningham, a union steward; an August 13, 2007 letter from Ms. McQuarter regarding appellant's whereabouts and leave documentation; a January 8, 2008 letter from Ms. Allen regarding the scheduling of an investigative interview; an August 26, 1997 step 2 grievance decision denying appellant's grievance; and a June 20, 2001 letter from Ruben Rodriguez, acting plant manager, informing appellant that her bid assignment was abolished due to current operational requirements. Additional medical reports were also submitted.

By decision dated February 12, 2008, the Office denied modification of the March 19, 2007 decision.

In a March 3, 2008 letter, appellant requested a review of the written record. She reiterated that she was subjected to a hostile work environment. Appellant stated that Ms. Allen would deliberately greet all employees except her and moved employees from the cases next to her to alienate her. She stated that Ms. Allen used trivial matters to instigate situations and several times told appellant to go home. Appellant alleged that she was overworked in the outgoing operation and that she became unassigned in January 2001 when everyone's jobs were abolished. She also alleged that, because she had an occupational injury, managers discriminated against her in the name of her services being needed. Appellant indicated that she was due out-of-schedule pay for each Sunday and Monday that she worked going back to March 23 and 24, 1997 and that her time records were falsified. She submitted copies of disciplinary paperwork regarding a letter of warning and notice of removal; job offers and job description/availability; copies of grievance paperwork regarding limited-duty work assignments; copies of personnel paperwork; leave analysis from September 11, 1997; an "everything report" and pay stubs for pay periods 11 and 12 of 1997; a page from the Employee & Labor Relations Manual regarding ethical conduct; general correspondence about unemployment compensation; and medical records from April 21, 1997 to February 14, 2008.

In an April 10, 2008 letter, appellant claimed her medical information was seen by unauthorized personnel. She was asked to provide medical information directly to a manager as indicated in an August 2007 letter, but her medical information was reviewed by Personnel Official Cathy Walters, an attendance supervisor. Appellant also claimed that she gave her medical information to a supervisor, who left it on the desk and another employee saw it and told her.

In an April 29, 2009 decision, the Office denied appellant's request for a review of the written record as she had previously requested reconsideration on the same issue. Appellant was advised that she could request reconsideration before the Office.

On May 6, 2008 appellant requested reconsideration. She alleged that she worked out-of-schedule involuntarily and endured much stress and aggravation.

By decision dated July 23, 2008, the Office denied modification of its prior decisions.

## ***LEGAL PRECEDENT -- ISSSE 1***

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or illness has some connection with employment but nevertheless does not come within the concept or coverage of workers compensation. Where the medical evidence establishes that the disability results from an employee's emotional reaction to her regular or specially assigned employment duties or to a requirement imposed by the employing establishment, the disability comes within coverage of the Federal Employees' Compensation Act. The same result is reached when the emotional disability resulted from the employee's emotional reaction to the nature of her work or her fear and anxiety regarding her ability to carry out her work duties.[2] By contrast, there are disabilities having some kind of causal connection with the employment that are not covered under workers compensation law because they are not found to have arisen out of employment, such as when disability results from an employee's fear of reduction-in-force or frustration from not being permitted to work in a particular environment or hold a particular position.[3]

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under the Act.[4] Where the evidence demonstrates that the employing establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a compensable employment factor.[5]

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.[6] If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an

[2] *Ronald J. Jablanski*, 56 ECAB 616 (2005); *Lillian Cutler*, 28 ECAB 125, 129 (1976).

[3] *Id.*

[4] *Charles D. Edwards*, 55 ECAB 258 (2004).

[5] *Kim Nguyen*, 53 ECAB 127 (2001).

[6] *Dennis J. Balogh*, 52 ECAB 232 (2001).

analysis of the medical evidence.[7] As a rule, allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim, but rather, must be corroborated by the evidence.[8] Mere perceptions and feelings of harassment will not support an award of compensation.[9]

## ***ANALYSIS -- ISSUE 1***

Appellant alleged discrimination, harassment and mistreatment as an employee. She claimed that, for over six years, Ms. Allen created a stressful and hostile working environment. To the extent that incidents alleged as constituting harassment by a supervisor are established as occurring and arising from appellant's performance of regular duties, these may constitute employment factors.[10] However, for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.[11]

The evidence of record fails to support appellant's claim of harassment or retaliation. She alleged Ms. Allen inappropriately touched employees, had inappropriate relationships with employees, brought inappropriate material to work and was biased toward certain employees. The witness statements submitted by appellant are general in nature and do not address the allegations of a hostile working environment raised by appellant. One witness statement indicated that Ms. Allen would generally hug male employees and talk to them; however, such behavior does not establish the allegations of harassment alleged in this case. Ms. Allen denied any unfair treatment of employees. The factual evidence fails to support appellant's claim that she was harassed by her supervisor.[12] Appellant asserted that the two letters written by Ms. McQuarter and Ms. Allen were evidence of harassment as her claim was still not resolved. She alleged that they used veiled threats before allowing her to respond. However, the file does not contain sufficient evidence to substantiate these allegations as factored.

Appellant also filed grievances and an EEO claim for harassment and discrimination. However, the Board notes that grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.[13] The evidence of record regarding appellant's grievances and EEO complaints does not establish any improper action by her

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[7] *Id.*

[8] *Charles E. McAndrews*, 55 ECAB 711 (2004); *see also Arthur F. Hougen*s, 42 ECAB 455 (1991) and *Ruthie M. Evans*, 41 ECAB 416 (1990) (in each case, the Board looked beyond the claimant's allegations to determine whether or not the evidence established such allegations).

[9] *Beverly R. Jones*, 55 ECAB 411 (2004).

[10] *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

[11] *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991). *See Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

[12] *See Michael A. Deas*, 53 ECAB 208 (2001).

[13] *James E. Norris*, 52 ECAB 93 (2000).

supervisors or managers. Thus, appellant has not established a compensable employment factor based on harassment.

Other allegations by appellant relate to administrative or personnel actions. She claimed that she was provided with multiple modified job offers after she had accepted a modified job offer. The assignment of work is an administrative matter.[14] The Board finds that appellant has not submitted sufficient evidence to establish error or abuse about the disputed job offers. The evidence does not establish that her supervisors acted unreasonably in providing the modified job offers as the needs of the employing establishment changed such it could no longer support the schedule appellant preferred. While appellant filed grievances and EEO complaints regarding these allegations, there are no final determinations to establish that the employing establishment erred or was abusive in carrying out these administrative functions. Mr. Sanders explained the reasons why appellant's modified job assignments changed or were eliminated periodically. The Board has also held that denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment under the Act, as they do not involve an employee's ability to perform his regular or specially assigned work duties, but rather constitute a desire to work in a different position.[15] The employing establishment has explained the reasons for its actions in these administrative matters. Appellant has not presented evidence to support that the employing establishment acted unreasonably. Additionally, the evidence shows appellant did not actually work in some of the disputed job offers, but rather claimed that the administrative action of the employing establishment in making such offers caused her emotional reaction. Thus, any emotional reaction was due to the administrative job offer process and not to her work duties. Appellant has not established a compensable factor of employment in this regard.

Appellant alleged that the employing establishment did not provide her with a valid contract when it advised that she must adhere to the job offer of May 19, 2006 and her off days would be Saturday and Friday. She claimed that the employing establishment did not follow proper procedures for changing her off days. Appellant's dissatisfaction with the administrative process in the scheduling of workdays positions to administrative or personnel matters unrelated to her regular or specifically assigned work duties.[16] She has presented no evidence to support that her supervisors, acted unreasonably. The evidence shows that appellant was given several opportunities to sign job offers but she refused and continued to report to work on unscheduled days. Additionally, Mr. Sander's statement supports that the schedule change was made to meet the needs of the employing establishment. While appellant filed grievances and EEO complaints regarding her schedule, the evidence of record does not establish error or abuse in these administrative functions. Thus, she has not established administrative error or abuse in the performance of these actions and they are not compensable factors.

[14] *Donney T. Drennon-Gala*, 56 ECAB 469 (2005).

[15] *Donald W. Bottles*, 40 ECAB 349, 353 (1988).

[16] *See Janet I. Jones*, 47 ECAB 345, 347 (1996); *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

Appellant alleged that she suffered an emotional reaction when she was escorted out of the building by two police officers on November 23, 2006. The record reflects that she was not scheduled to work on November 23, 2006 and was escorted from the building after she refused to leave the premises, as requested. As appellant was not scheduled to be at work on November 23, 2006, any emotional reaction to this incident is self-generated and not in the performance of duty. There is no evidence showing that the employing establishment acted unreasonably in this administrative matter.

Appellant alleged that her medical information was reviewed by an unauthorized personnel official, Ms. Walters, in 1997. A review of the disciplinary paperwork submitted which Ms. Walters signed indicates that appellant had submitted the medical documentation. The medical documentation referenced, a September 17, 2007 work excuse note, relates to appellant's attendance and disability. Appellant submitted no supporting evidence to show it was improper for Ms. Walters to see that document in her official capacity. While she additionally claimed another employee had seen her medical information, which she left on the supervisor's desk, she submitted insufficient evidence to substantiate her allegation. Leave matters are administrative in nature.[17] Appellant has not established that the employing establishment erred in this matter.

Appellant alleged that she worked out-of-schedule. The employing establishment indicated that she was repeatedly asked to adhere to the specified days and times in the current job offer, but she continued to report to work as she saw fit. Appellant submitted no evidence to substantiate her allegation as factual.

Appellant also alleged that she was not paid for some of her work. A review of the evidence of file, however, does not support this allegation. A review of the "everything report" and pay stubs for pay periods 11 and 12 of 1997 are consistent in the hours appellant worked and the hours for which she was paid. Also, the pay stubs reflect earnings for the hours. There is no evidence which substantiates appellant's allegation she was not paid for hours worked.

Appellant made a general allegation of overwork. She also stated that she had to do extra work and other employees were not required to perform extra work. The file, however, does not contain evidence to substantiate that appellant was assigned and actually performed extra work. To the extent appellant alleged overwork, this is not established by the evidence.[18] She also did not attribute her emotional condition to performing a specific regular or specially assigned duty in her job.

Consequently, appellant has not met her burden of proof to establish her claim for an emotional condition as she has not attributed her claimed condition to any compensable employment factors.[19]

[17] *See Jeral R. Gray*, 57 ECAB 611 (2006).

[18] The Board has held that overwork, as substantiated by sufficient factual information to support the claimant's account of events, may be a compensable factor of employment. *Bobbie D. Daly*, 53 ECAB 691 (2002).

[19] As appellant has failed to establish a compensable employment factor, the Board need not address the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496 (1992).

## ***LEGAL PRECEDENT -- ISSUE 2***

Section 8124(b) of the Act,[20] concerning a claimant's entitlement to a hearing before an Office representative, states, "Before review under section 8128(a) of this title, a claimant ... not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."[21] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.[22]

## ***ANALYSIS -- ISSUE 2***

Appellant requested an oral hearing in this case. However, she had previously requested reconsideration and, therefore, under section 8124(b)(1) of the Act, she was not entitled to a hearing as a matter of right. The Office properly exercised its discretion and determined that the matter could equally well be addressed by requesting reconsideration and submitting new evidence that established that she sustained an injury in the performance of duty.

Therefore, the Office properly denied appellant's request for a hearing as a matter of right as she previously requested reconsideration. It also properly exercised its discretion in further denying appellant's request for a discretionary hearing.

## ***CONCLUSION***

The Board finds that the evidence fails to establish that appellant sustained an emotional condition in the performance of duty. The Board further finds that the Office properly denied appellant's request for a hearing.

[20] 5 U.S.C. §§ 8101-8193.

[21] 5 U.S.C. § 8124(b)(1). *See* 20 C.F.R. § 10.616(a).

[22] *Claudio Vasquez*, 52 ECAB 496 (2001); *Herbert C. Holley*, 33 ECAB 140 (1981).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated July 23, April 29 and February 12, 2008 are affirmed.

Issued: June 10, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board